IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO. 71-1198

THE TEXAS HIGHWAY DEPARTMENT,
ET AL.,

Petitioners

VS.

NAMED INDIVIDUALS,

Respondents

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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NOTICE OF APPEARANCE

I, LUCIEN B. CAMPBELL, an Attorney duly licensed to practice before the Supreme Court of the United States, hereby enter my appearance as counsel for Movant's Amicus Curiae Brief in the above styled and numbered cause.

Respectfully submitted,

Lucien B. Campbell

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TO THE SAID HONORABLE COURT:

NOW COMES THE COUNTY OF BEXAR, a political subdivision of the State of Texas, by and through her Criminal District Attorney, and files this her Amicus Curiae Brief pursuant to a formal Order of Commissioners' Court (Please see Appendix "A"), and pursuant to Rule 42-4 of the Supreme Court Rules, and supports and wholly adopts the Petition for Writ of Certiorari filed herein by The Texas Highway Department, The Texas Highway Department, Et Al, Petitioners vs. Named Individuals, Respondents, No. 71-1198, and would show the Court the following:

INTEREST OF THE AMICUS CURIAE

The Commissioners' Court of the County of Bexar as the elected governing body of said County has a duty and obligation to bring to the attention of this Honorable Court the plight that has befallen the citizenry of Bexar County. Since 1961, when a bond election which passed by a vote of almost 2 to 1 was held to finance the purchase of right-of-way, the citizenry of Bexar County have been held, by our system of judicial process, in a state of confusion and frustration over the failure to complete the "North Expressway". Much more recently, the citizens of Bexar County again had an opportunity to voice their approval for completing the "North Expressway" when a petition urging completion was circulated among the residents of the County, and over 100,000 residents signed that petition.

Bexar County has always endeavored to be a progressive and far-sighted county. It is indeed ironic that one of the first

expressways to be built in the State of Texas, was built in Bexar County. Now Bexar County finds itself in the seemingly helpless position of having a multimillion-dollar expressway, lying partially completed in a county that has always taken great pride in its fine road network.

The "North Expressway" was to link the North Central area of the County, the area in the county with the greatest growth potential, to the downtown area, or heart of San Antonio. At a time when the City of San Antonio and Bexar County is desperately seeking ways and means to revitalize the heart of the City we find a major traffic artery to the downtown area which will greatly help in this revitalization stayed from completion.

Bexar County has had to forestall the construction of other county roads in the North Central area of the County because of the failure to complete the "North Expressway".

Unless the "North Expressway" is completed, the great potential of the North Central area of Bexar County may never be fully realized at a great cost and detriment to the County of Bexar and its citizens.

ARGUMENT FOR GRANTING THE WRIT

A. The authority of the Secretary of Transportation:

As was pointed out to this Court in the Texas Highway Department's Petition in this pending cause, the decision of the United States Court of Appeals for the Fifth Circuit, handed down on August 5, 1971, in

NAMED INDIVIDUAL MEMBERS OF THE SAN ANTONIO CONSERVATION SOCIETY, ET AL, vs THE TEXAS HIGHWAY DEPARTMENT and THE UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL, 446 F.2d. 1013 (1971) has stayed the completion of the "North Expressway", "until the Secretary has completed his administrative review." The question now arises as to whether or not the Secretary of Transportation has any further authority to "complete administrative review" since subsequent to the Decision of May 5, 1971 of the United States Court of Appeals for the Fifth Circuit, the Texas Highway Commission adopted a Minute Order severing its relationship with the Federal Highway Administration; terminated the State's request for Federal Aid, and the State of Texas returned all federal monies which had been transferred to the State for the Expressway.

The applicable Federal Statutes involved are: Section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. Section 1553 (f); Section 138 of the Federal - Aid Highway Act of 1968, 23 U.S.C. Section 138 and Section 102 (2) of the National Environmental Policy Act of 1969, 42 U.S.C. Section 4332, and they provide the Secretary of Transportation with the authority to conduct an administrative review, but they are no longer applicable because the applicability of these statutes is predicted on the use of Federal funds in the construction of a Federal - Aid Expressway.

Federal funds are no longer to be used in the construction of this expressway. The Federal funds that were transferred to the State of Texas have been returned.

If the Secretary of Transportation no longer has jurisdiction over or authority to "complete an administrative review" how then may the requirement set by the Fifth Circuit Court requiring said review be met? How may the District Court proceed to conduct a "full review" until said requirement is met? Must the partially completed "North Expressway" stand as a grotesque monument to the decision of the Fifth Circuit Court? The above set out questions can only be answered by this Honorable Court.

B. The State of Texas has the right to complete the "North Expressway":

In their decision of August 5, 1971, the Court of Appeals, for the Fifth Circuit in NAMED INDIVIDUAL MEMBERS OF THE SAN ANTONIO CONSERVATION SOCIETY, ET AL, vs THE TEXAS HIGHWAY DEPARTMENT, ET AL, and THE UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL, supra., likened the arrangement between the Federal and State defendants to a "marriage". By what legal requirement, either State or Federal, must a man and wife be compelled to remain married once it is determined that their union has become an unhappy one. The answer to an unhappy marriage is provided in law through divorce, which is a separation, a parting of the ways, a departure by each spouse to determine his own destiny. Does not the State of Texas and the Federal Government have this same right to a separation, a parting of the ways, a departure to seek their own respective destinies? What Federal laws require that the Federal Government and a State must be irrevocably bound together to complete an expressway? Must a State be required to accept Federal funds which that State neither wants nor needs?

The State of Texas through her Highway Department now seeks to do what every state has always had the inalienable right to do, which is to construct an expressway wholly within her own borders and wholly with her own funds. Under what Federal statute or case law may a State be estopped by a Federal Court from constructing an expressway wholly within the borders of that State and wholly constructed with that state's funds.

In an earlier proceeding in this matter before the United States Court of Appeals for the Fifth Circuit, the Department of Transportation filed a memorandum stating that when the contracts between it and the State were cancelled, the Department of Transportation, "will not have any authority to require the State of Texas to comply with the Federal - Aid Highway Law". Department of Transportation memorandum at 4, Texas Highway Department vs Named Individuals, Misc. No. 2243, (5th Circuit, December 20, 1971).

In actuality, the agreement between the Texas Highway Department and the Federal Agency is a contractual one. If one party to a contract seeks to withdraw from that contract he may do so notwithstanding that he may be liable for damages or compelled to complete the contract by a suit for specific performance. The Federal Government has not suffered any damage because the Federal funds which were advanced have been returned in toto. Again the question arises, may the Federal Government through a suit for specific performance compel the State of Texas to accept Federal funds? It is unlikely that the Federal Government would follow such a course.

In his dissenting opinion, in the United States Court of Appeals for the Fifth Circuit's decision of May 5, 1971 in NAMED INDIVIDUAL MEMBERS OF THE SAN ANTONIO CONSERVATION SOCIETY, ET AL vs THE TEXAS HIGHWAY DEPARTMENT, ET AL, and THE UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL, supra., Circuit Judge Clark likened the arrangement between Texas and the Federal Government to a "proposal". Circuit Judge Clark stated, "If Texas made a final disengagement from what appears to me more nearly a proposal than a marriage, then neither Section 4 (f) of the Department of Transportation Act of 1966 or the National Environmental Policy Act of 1969 would govern the execution of the remaining construction.".

Whether the arrangement between Texas and the Federal Government is considered to be a "marriage", a "proposal" or a "contract", does not Texas, as does any spouse or as does any party to a proposal or contract, have the right to disengage itself from the arrangement and seek its destiny in this matter on its own?

CONCLUSION

The questions posed in this Brief may only be answered by this Honorable Court. The answers are vitally important to the State of Texas, the County of Bexar and every State that enters into similar arrangements with the Federal Government.

As matters now stand the decision of the United States Court of Appeals for the Fifth Circuit in NAMED INDIVIDUAL MEMBERS OF THE SAN ANTONIO CONSERVATION SOCIETY, ET AL, vs THE TEXAS HIGHWAY DEPARTMENT ET AL and THE

UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL, supra., has caused this matter to reach an impasse, which may only be resolved and settled once and for all by the attention of this Court.

WHEREFORE, Bexar County as Amicus Curiae respectfully recommends that Writ of Certiorari be granted and judgment of the Court of Appeals be vacated.

Respectfully submitted,

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Criminal District Attorney
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RICHARD I. MILLER
Assistant Criminal District Attorney

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Attorneys for the County of Bexar, State of Texas

CERTIFICATE OF SERVICE

I, LUCIEN B. CAMPBELL, Assistant Criminal District Attorney for Bexar County, Texas, hereby certify that I have served three (3) copies of the foregoing Brief on Mr. Samuel D. McDaniel, Assistant Attorney General, Post Office Box 12548, Capitol Station, Austin, Texas, 78711, Attorney for State Defendants; Mr. Seagal V. Wheatley, Former United States Attorney, Western District of Texas, appearing as special counsel for Federal Appellees, and Mr. John W. Vardaman, Jr., Williams & Connolly, 1000 Hill Building, Washington, D. C., 20006, Attorneys for the Plaintiff, by depositing same in the United States mail postage prepaid, on this 8th day of May, A. D., 1972.

Lucien B. Campbell

LUCIEN B. CAMPBELL
Assistant Criminal District Attorney
Bexar County, Texas

APPENDIX A

WHEREAS, the construction of the North Expressway has been partially completed, and has been pending since 1961; and,

WHEREAS, the failure to complete this Expressway has deterred the Transit System in Bexar County and has impeded the mobility of this community, causing great inconvenience in the cross traffic in this metropolitan area; and,

WHEREAS, Commissioners' Court of Bexar County feels that the completion of the North Expressway is necessary and vital to the completion of our highway system that is so important to the life of down-down San Antonio, and to the citizens residing in the suburban areas; and,

WHEREAS, the abovementioned action is of great importance to all citizens of Bexar County, NOW, THEREFORE,

It is ORDERED by Commissioners' Court that the District Attorney of Bexar County, is hereby instructed to make known the intentions of Bexar County, and to file an Amicus Curiae Brief in the Cause styled TEXAS HIGHWAY DEPARTMENT, ET AL, Petitioners, VS Named Individuals, No. 71-1198, now pending before the Supreme Court of the United States.